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In The

Supreme Court of the United States

October Term, 1964

No. 450

PAUL RHODES, PETITIONER,
V.
CLARENCE A. H. MEYER, ET AL., RESPONDENTS.

PAUL RHODES, PETITIONER,
V.
RICHARD M. VAN STEENBERG, ET AL., RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Do complaints, in a civil rights action, which do not set forth any substantial facts establishing federal jurisdiction, but merely assert conclusions of violation of constitutional rights, state any claims upon which relief can be granted?

2. Have the doctrines of judicial and quasi judicial immunity been abrogated by the Civil Rights Act?

3. Did the District Court and the Court of Appeals properly determine that the doctrines of stare decisis and res judicata bar presentation in the instant cases of matters previously and finally determined in a substantially similar prior action?

4. Could the trial court properly consider the records in the files of Nebraska State Court cases referred to and necessarily made a part of the complaints in the instant cases?

5. Did the District Court have jurisdiction of any matters alleged by the complaints in the instant cases?

6. Is there any conflict between any United States Courts of Appeal as to the existence of immunity protecting the respondents from liability for any of the acts or omissions alleged in the complaints in the two cases now under consideration.

7. Does a judgment sentencing a defendant to serve a term in a state penitentiary for contempt of court violate any rights guaranteed by the Constitution of the United States?

8. Should this Court consider instructions given and a verdict rendered in a proceeding, which resulted in a default judgment in a judicial district other than the one from which these cases were appealed, and in which proceeding none of the respondents were parties?

STATEMENT OF THE CASE

These cases are before this court on the petition of Paul Rhodes for writs of certiorari to the United States

Court of Appeals for the Eighth Circuit. The actions were commenced in the United States District Court for the District of Nebraska by the petitioner as plaintiff, who sought to recover damages from the defendants under the Federal Civil Rights Act. The defendants were a number of Nebraska judicial and law enforcement officers. Motions to dismiss were filed in both actions on behalf of all the defendants, and after hearing and submission of briefs, the district court sustained the motions to dismiss and entered orders dismissing the complaints as to all the defendants. The opinions of Judge John W. Delehant are published in the case of *Rhodes* v. *Meyer* at D. Neb., 225 F. Supp. 80 and in the case of *Rhodes* v. *Van Steenberg* at D. Neb. 225 F. Supp. 113. It should be observed that the ruling appeal from *Meyer* sustained motions to dismiss an amended complaint.

Petitioner then prosecuted appeals in both cases to the United States Court of Appeals for the Eighth Circuit. That Court upon submission of both cases on briefs and consolidated oral arguments, affirmed the judgments appealed from in an opinion by Judge Martin Van Oosterhout, dated August 5, 1964 and published at — F. 2d —.

ARGUMENT

Preface

As the lower courts found, the amended complaint in *Meyer* and the complaint in *Van Steenberg* are based upon substantially the same matters as were alleged in *Rhodes* v. *Houston*, D. Neb., 202 F. Supp. 624, aff'd. 309 F. 2d 959, cert. den. 372 U. S. 909, 83 S. Ct. 724, 9 L. Ed. 2d 719. Subsequently the petitioner filed the

two cases now under consideration, which have been determined as above indicated. It would serve no useful purpose here to set forth the history of the state court proceedings inherently a part of petitioner's complaints, nor to summarize those complaints. A detailed and scholarly analysis of those matters is set forth in the lower courts' opinions.

The amended complaint in the *Meyer* case is summarized on pages 83-90 of 225 F. Supp. and the complaint in *Van Steenberg* at pages 115-119 of the same volume. The criminal case charging the petitioner with arson, which began the history of this litigation, is discussed in detail at pages 96-98 and 112 of the *Meyer* opinion and at pages 120-121 of the *Van Steenberg* opinion. The proceeding resulting in the judgment of conviction for contempt of court, which followed closely the proceedings in the arson case, are discussed at length on pages 99-102 of the *Meyer* opinion and on pages 122-126 of the *Van Steenberg* opinion.

References herein to the Circuit Court's opinion will be to pages of Appendix A attached to the Petition.

I. All the Respondents Are Immune From Liability For Any Acts or Omissions Sought to Be Alleged in the Complaints.

It would serve no useful purpose here to reiterate at length the lower courts' holdings concerning the immunity from suit of all the respondents. Such holdings, well supported by authority, are found in the trial courts' opinions in *Houston, supra*; in *Meyer*, at pages 102-105, 107, 108; in *Van Steenberg*, at pages 130-133; and in the Circuit Court's opinion, at pages 34-36.

It is clear, as the trial court holds, that all the defendants ". . . were immune to suit for acts by them, or any of them, done in the course of the execution and performance of their duties of their respective offices or positions." 225 F. Supp. 107.

The trial court's opinion in *Rhodes* v. *Houston,* 202 F. Supp. 624, presents a detailed and well reasoned consideration of the immunity questions here involved and needs no elaboration here. As the lower courts held in *Houston, Monroe* v. *Pape,* 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 and *Egan* v. *City of Aurora,* 365 U. S. 514, 81 S. Ct. 684, 5 L. Ed. 2d 741, do not eliminate the immunity relied on by respondents.

In *Monroe,* the allegations against the police officer defendants clearly raised questions of federal constitutional import, alleging violations of the Fourth Amendment. The court held that the statutory language "under color of state law" did not mean pursuant to state law, and did not exclude acts of policemen, who could show no authority under state law, custom, or usage for what they did, and who violated the state constitution and laws.

Egan v. *City of Aurora, supra,* cited by plaintiff at pages 9 and 10 of the petition, does not support his contentions on the immunity questions involved. Entirely different types of governmental officials were involved in *Egan.* What this court there disapproved was the Circuit Court's sweeping refusal to acknowledge federal jurisdiction except in exceptional cases of extreme emergency involving the possibility of irreparable injury. Note the Seventh Circuit Court's holding, summarized at page 380 of 275 F. 2d:

> "A local controversy such as this involving dispute between officials and officers of a municipality is not the kind of case which should be brought in the federal courts."

It is inconceivable that this Court in *Egan* would have abrogated the long recognized rules of immunity stated and supported in the three *Rhodes* cases without expressly pointing out the extent to which the cases establishing the immunities were overruled.

Picking v. *Pennsylvania Railroad Company,* 3 Cir., 151 F. 2d 240, (this is the case petitioner refers to as *Pickering* v. *Pennsylvania*) upon which petitioner relies (see pages 9, 10 and 11 of the petition) is plainly wrong. This case has met with disfavor from every side, is no longer followed even in Pennsylvania and has been repudiated as plainly wrong. Various explanations have been given for the *Picking* case. It has been said in *Francis* v. *Crafts,* 1 Cir., 203 F. 2d 809, that it was decided before the illuminating and compelling analogy which was found in *Tenney* v. *Brandhove,* 341 U. S. 367, 71 S. Ct. 783, 95 L. Ed. 1019. In *Francis* v. *Lyman,* 1 Cir., 216 F. 2d 583, it was stated that perhaps the court in the *Picking* case intended to shock the conscience of the federal legislators in an attempt to have the law changed. Whatever reason we may choose to explain the *Picking* case is unimportant; it is submitted that it is without authoritative effect. See *Niklaus* v. *Simmons,* D. Neb., 196 F. Supp. 691.

Cooper v. *Pate,* — U. S. —, 84 S. Ct. 1733, — L. Ed. 2d —, upon which petitioner relies so extensively is without applicability here. That case does not concern itself with any of the issues raised in the instant cases. No question of immunity from suit was pleaded, dis-

cussed and determined in *Cooper,* either by this Court, the Seventh Circuit Court of Appeals whose opinion is reported at 324 F. 2d 165, or the District Court which originally decided the case.

In a short opinion this Court held only that it was erroneous to summarily dismiss the petitioner's complaint, alleging that solely because of his religious belief he was denied permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners in the Illinois State Penitentiary. An examination of the Circuit Court opinion discloses that it affirmed the District Court on the basis of the broad power of officials of penal institutions to conduct internal operations in the manners they deem most advisable.

Johnson v. *Cromlish,* E. D. Pa., 224 F. Supp. 22, cited by plaintiff is clearly distinguishable. There the plaintiff sued a district attorney, his assistant, the clerk of a court, a prison warden, a private attorney, a county detective and a private individual. He alleged the following: He was presented a card signed by a private attorney stating that he was subpoenaed to appear as a witness in a matter set for hearing three days later. The card was not a subpoena, and no subpoena was ever issued. Plaintiff is a member of a religion, which celebrated its annual highest of holy days on the date the plaintiff was requested to testify at the hearing; his religion required him to spend that entire day in continuous prayer and fasting. The defendants caused a bench warrant to be issued for the immediate arrest of the plaintiff, with knowledge of the conflict in schedules brought about as above stated; when he did not appear at the hearing they caused him to be taken to

the city hall, where he was held for six hours without being brought before the judge who issued the warrant. He was then removed to a cell in the county prison and incarcerated there for eight days and later released without ever having been charged or brought before the judge who issued the warrant. The defense conceded that the complaint stated, or at least strongly suggested, a deprivation of rights, privileges or immunities secured to the plaintiff by the Constitution of the United States.

The contentions relied upon by the defendants in *Johnson* are not involved in the instant cases. Defendants there contended that the plaintiff must allege a purposeful and systematic policy of discrimination by public officials before a cause of action under the Federal Civil Rights Acts can be stated. No such issue is involved here. The public official defendants in *Johnson* also contended that there must be physical brutality, failure to furnish urgently needed medical aid or other such extra-ordinary circumstances before a cause of action can be stated under the Federal Civil Rights Act. The court stated that the holding incommunicado of the plaintiff for eight days without a hearing constituted such a violation and that, in any event, it did not agree with defendants' statement of the law. The defendants in the instant cases need not and do not rely on any such contentions.

In *Nesmith* v. *Alford,* 5 Cir., 318 F. 2d 110, relied on by petitioner plaintiffs charged defendant police administrators and officers with various acts amounting to false imprisonment, malicious prosecution and violation of civil rights. After hearing the evidence the jury returned verdicts in favor of all the defendants,

except one in whose favor the court had directed a verdict. The evidence showed that the defendant police officers had brought about plaintiffs' arrests pursuant to warrants secured through the use of false affidavits. At the time of the arrest the plaintiffs' child was taken from them, and they were not permitted to see her nor learn of her whereabouts for several hours. The Circuit Court held that the initial arrest and imprisonment were unlawful as a matter of Alabama law, and that requisite diversity of citizenship and amount in controversy existed. Subsequent to the arrest the plaintiffs were tried on trumped-up disorderly conduct charges. One plaintiff was acquitted, the other convicted, although that conviction was later set aside by an Alabama appellate court. The court on this question held that malice, an element of malicious prosecution, had not been shown as a matter of law, but that the plaintiffs were entitled to more favorable instructions on that issue on retrial.

A directed verdict was entered in favor of one defendant who had, on receiving a call to the effect that racial trouble might be brewing, assigned an officer to investigate and the next day issued warrants on the basis of affidavits of an experienced police officer. The court, at page 127, said that this officer was protected by immunity which is at least quasi judicial in character. It should be observed that this is the only point in the opinion at which immunity is discussed.

In addition, the case does not present any question as to the sufficiency of the complaint to state a claim upon which relief might be granted. The questions discussed were the sufficiency of the evidence to establish the offenses charged as a matter of law, and the

case in no way conflicts with the decisions of the lower courts in the three *Rhodes* cases.

Plaintiff also cites *Norden* v. *McShane*, 5 Cir., 332 F. 2d 855. That case is without applicability in the instant situation. There three plaintiffs sued various persons in the Justice Department, including attorneys in the Attorney General's office and law enforcement officers in the office of the U. S. Marshals. The plaintiffs' alleged wrongs connected with their arrests in October, 1962, in Oxford, Mississippi, including malicious arrest and detention without probable cause and without charges for 24 hours during which time they were required to sit in a rigid position for 18 hours without speaking, eating or drinking. They also alleged that the defendant forced them to witness inhuman treatment of others, subjected them to vile abuse and mistreatment and committed assault and battery on them with a large stick. Other counts alleged conspiracy to deprive plaintiffs of equal protection of the laws and equal privileges and immunities under the laws. The actions were allegedly based on §§ U. S. C. 1983 and 1985(3). The case centered around the question as to whether the term "scope of authority" should be interpreted so as to include malicious acts. The court went on to say that the immunity applies in even those situations and also that it is not limited to high ranking officials. On page 860 the court cited many cases holding law enforcement officials are immune from civil suits based on allegedly malicious acts. The court expressly refrained from rendering an opinion as to whether or not the civil rights act in any way abrogates common law immunity rules and decided that the instant actions were not within the purview of that act.

McNeese v. *Board of Education for Community High School Dist.* 187, *Cahokia, Ill.*, 373 U. S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622, cited by petitioner, is inapplicable, it was there alleged that certain area school boundaries had been set up so that segregation existed and that one school within the county was, to a large extent, operated on a segregated basis. The defendants asserted that, under a state statute, the superintendent of public institutions could conduct an investigation and, if he found unlawful segregation, could request the Attorney General to bring suit to correct the wrong. This Court held that the existence of this state remedy did not bar the suit because uncertain state remedies cannot bar federal suits on violation of equal protection claims, such as were alleged in *McNeese*. This case has no bearing, even analogously, on the issues in the instant cases.

II. Res Judicata and Stare Decisis Bar Presentation in the Instant Cases of All Matters Alleged in the Complaints Therein.

The trial court and the Court of Appeals properly determined that the doctrines of res judicata and stare decisis completely bar presentation of any issues sought to be raised in the instant actions for the reason that all such issues were finally determined adversely to petitioner's contentions in *Rhodes* v. *Houston, supra.* This District Court based its holding primarily on stare decisis and the correctness of the *Houston* decision. As the District and Circuit Courts properly determined, the only two features of the instant cases which might be considered additional to matters raised and determined in *Houston* do not alter this determination.

The first such feature relates to the fact that plaintiff completed his imprisonment after the trial court's ruling in *Houston* and after his appeal in the contempt case had been dismissed for failure to file briefs. As lower courts held, the second period of confinement was before the court in *Houston* to such a degree as to make application of res judicata to that feature proper. See the trial court's opinion in *Meyer* at page 109 and the Circuit Court's opinion at pages 25-28. The confinement pending the appeal was not a part of serving the contempt sentence, petitioner could have posted bond and secured his release during this period at any time he desired, which he eventually did. See the *Van Steenberg* opinion, 225 F. Supp. 113, 125.

The second feature relates to use of alleged misstatements in the *Houston* case itself. The lower courts correctly held that allegations relating to such misstatements stated no claim upon which relief might be granted and further that such matters should have been raised, if at all, in the *Houston* case itself. See page 94 of 225 F. Supp. and the Circuit Court's opinion, pages 28-30.

For complete discussions of the lower courts' holdings relating to res judicata and stare decisis, see the *Meyer* opinion, pages 90-93, 96, 105-107, 108; the *Van Steenberg* opinion, pages 126-130, 133; and the Circuit Court's opinion, pages 23-36.

While it is not of controlling significance, it is submitted that the District Court limited the application of res judicata and estoppel by judgment too narrowly in view of the many cases filed by petitioner involving

substantially the same facts. As was said in *Nichols* v. *Alker,* E. D. N. Y., 126 F. Supp. 679, aff'd. 231 F. 2d 68:

> "It must be recognized that the application of res judicata no longer stands on absolute identity or privity of parties. In Bruszewski v. U. S., 3 Cir., 181 F. 2d 419, 422, the court said: '* * * where, as in this case, res judicata is invoked against a plaintiff who has twice asserted essentially the *same claim against different defendants,* courts have * * * enlarged the area of res judicata beyond any definite categories of privity between the defendants'." (Emphasis added)

See also *Riodan* v. *Ferguson,* S. D. N. Y., 80 F. Supp. 973, and *Liberty Mutual Ins. Co.* v. *George Colon and Co.,* 260 N. Y. 305, 183 N. E. 506 and Restatement, Judgments, § 83, at page 389.

Respondents have had a great deal of difficulty in attempting to decipher what petitioner is attempting to say in his fourth reason in support of his petition for a writ of certiorari as stated on pages 12-15 of the petition. What he appears to be saying is this. District Judge Robert Van Pelt, in his opinion in *Rhodes* v. *Houston, supra,* relied upon the rule, often applied in habeas corpus cases, authorizing judges to consider matters other than which appears on the face of the pleadings themselves, in support of his examination of records and files of state cases referred to in complaint in *Houston.* Normal concepts of res judicata do not apply in habeas corpus cases. Therefore, res judicata and state decisis cannot be applied in the cases now under consideration. If this is the point petitioner seeks to make, it is so absurd that it hardly requires comment. Petitioner has cited no authority and respondents find none which indicates that res judicata

and stare decisis are not applicable in cases allegedly based on the Federal Civil Rights Act, see the Circuit Court's opinion at page 31.

On page 13 of the petition it is asserted that the District Court of Cheyenne County, Nebraska, in a habeas corpus case determined that the involved contempt conviction and sentence are void because of violations of The United States Constitution. This contention was considered by the District Court in each of the three *Rhodes* cases and rejected in each. The only basis for the grant of the writ of habeas corpus by the District Court of Cheyenne County was that "the sheriff did not have a valid warrant or commitment authorizing the arrest of this plaintiff." When this technical defect was corrected the subsequent arrest was entirely lawful. See, for example, *Rhodes* v. *Van Steenberg,* D. Neb. 225 F. Supp. 113, 134.

III. The Lower Courts Properly Considered the Files and Records of Other State and Federal Cases Out of Which the Instant Actions Arose and Which Are Brought into Issue By the Complaints in the Instant Cases.

The petitioner lists, as his first reason for granting the writ, the District Court's consideration of more than the bare allegations of the complaint, in ruling on the motions to dismiss filed by the respondents. Respondents submit that it was entirely proper for the District Court to consider the public records and files of cases in the Nebraska and federal courts closely related to and out of which the instant proceedings arose. The trial court correctly observes, at pages 96, 108 and 126 of 225 F. Supp., that ruling on the motions

to dismiss without considering the files and records of such other proceedings, which are placed in issue by the complaints, would render any such rulings essentially unrealistic. It was also proper for the District Court to refer to and rely upon the *Houston* opinion dismissing a complaint alleging substantially the same facts.

In discussing what may be considered in ruling on a motion to dismiss, *Morse* v. *Lewis*, 4 Cir., 54 F. 2d 1027, 1029 states:

> "But in exceptional cases, as high authority shows, the dictates of logic will yield to the demands of justice, and the courts, in order to reach a just result, will make use of established and uncontroverted facts not formally of record in the pending litigation."

In a leading text on federal practice, 1A Barron & Holtzoff, Federal Practice and Procedure, § 349, it is said:

> "No hard and fast rule can be laid down as to what matters may be considered by the court on a motion to dismiss. Some courts refuse to consider anything but the pleading attacked. Others will explore the entire case to discover whether a controverted issue of fact is presented. (p. 301)
>
> * * *
>
> "Where other matters are incorporated by reference in the pleadings, the court may consider such matters in passing on a motion attacking the pleadings. (p. 312)
>
> * * *
>
> "Depositions and other documentary proof may also be utilized, but only under circumstances giving some assurance of circumstantial trustworthiness. (p. 316-17)
>
> * * *

> "The court may take judicial notice of the record and of facts concerning a prior suit, proceedings for issuance of summons, and continuances of the case." (p. 320)

In *Kithcart* v. *Metropolitan Life Ins. Co.*, D. Mo., 62 F. Supp. 931, aff'd. 150 F. 2d 997, it was said that:

> ". . . an amended petition to reform and recover on an accident policy was dismissed on the ground that the controversy presented was *res judicata*, where the petition, supplemented by court records and files of which judicial notice was taken, showed that a previous suit at law by the insured on the same insurance contract resulted in a verdict and judgment for the insurer from which there was no appeal."

The trial court's action here appears even more justifiable in view of the protracted history of litigation instigated by petitioner, in state and federal courts based on essentially the same factual allegations.

IV. Petitioner's Conclusionary Allegations With Respect to Sentencing at "Hard Labor" State No Claim Upon Which Relief May Be Granted.

First it should be noted that the amended complaint does not state what, if any, hard labor plaintiff allegedly performed, and, as the trial court observed at page 109 of 225 F. Supp., it is highly probable that the language in the sentence referring to hard labor was erroneously included; even so its inclusion did not affect the jurisdiction of the Nebraska trial court, and was a matter for correction on appellate review. Even if plaintiff had adequately plead and proved that he performed some "hard labor" pursuant to a judgment and sentence for contempt, he has cited no authority to

the effect that such would violate any provision of the United States Constitution or give rise to any claim for damages under the Federal Civil Rights Act.

In *Draper* v. *Rhay*, 9 Cir., 315 F. 2d 193, cited by the Circuit Court, the complaint charged in a civil rights suit that the defendant had deprived the plaintiff, when he was a state prisoner, of civil rights by forcing him to work, causing slavery and peonage. The defendant's motion to dismiss was granted. Petitioner here is manifestly in error in asserting at page 16 of the petition that the Circuit Court was under a misapprehension as to the nature of the *Draper* case. It is clearly shown in the second full paragraph on page 193 of 315 F. 2d, that the action was a civil action for alleged deprivation of plaintiff's civil rights and not a criminal case as petitioner states.

On page 197 the court in *Draper* stated:

> "Prison rules may require appellant to work but this is not the sort of involuntary servitude which violates Thirteenth Amendment rights. *Butler* v. *Perry*, 240 U. S. 328, 332, 36 S. Ct. 258, 259, 60 L. ed. 672, where it was said:
>
> > " 'This amendment was adopted with reference to conditions existing since the foundation of our government, and the term involuntary servitude was intended to cover these forms of compulsory labor, kin to African slavery which in practical operation would tend to produce like and desirable results'."

It should be remembered that *Smolczyk* v. *Gaston*, 147 Neb. 681, 24 N. W. 2d 362, on which petitioner relies at page 16 of his discussion, was decided entirely on the basis of Nebraska law. It did not hold that to

require labor of one held pursuant to a contempt conviction (if such were properly alleged and proved) violates the Thirteenth Amendment or any other provision of the Federal Constitution.

United States v. *Gaskin*, 320 U. S. 527, 64 S. Ct. 318, 88 L. Ed. 287, cited at page 18 of the petition, in no way supports petitioner's apparent contention that he has sufficiently alleged any actionable claim concerning the unintentional inclusion in the state court contempt judgment of the words "hard labor."

Gaskin involved an indictment against the appellee in federal district court charging the appellee with holding one Johnson in a "condition of peonage," claiming that Johnson was indebted to Gaskin, intending to cause Johnson to perform labor to satisfy that debt, detaining Johnson against his will and transporting him from place to place in Florida. It was not alleged that Johnson actually rendered any service to the appellee. The indictment was obtained under a section of the Criminal Code, prohibiting the holding of any person in a condition of peonage and providing for a fine or imprisonment for violations. The district court held that an essential element of the offense, not stated in the indictment, was that the person subjected to the peonage had actually performed labor or service for the accused. The Supreme Court held that no such element was essential to the offense. The case turns on the construction of language in the statute.

Flannagan v. *Jepson*, 177 Iowa 393, 158 N. W. 641, cited on page 17 of the petition, is distinguishable in several material respects from the instant situation and does not support petitioner's contentions. *Flannagan*

involved an appeal, from an Iowa trial court, testing the validity of the judgment and sentence of the court committing the plaintiff to the penitentiary for one year at hard labor, pursuant to a statute, which authorized such imprisonment upon conviction for contempt for violating a decree prohibiting the maintenance of a liquor establishment nuisance.

The court emphasized that imprisonment does not constitute involuntary servitude in violation of either the state or federal constitutions. The court's holding was also based on the fact that no right of appeal exists under the law of Iowa from a conviction for contempt; the opposite is true in Nebraska.

The distinctions between the factual situation involved there and in the instant cases, together with an examination of the reasons for the holding in that case, discloses that it provides no authority for plaintiff's contention that he has stated a damage claim against any of the defendants, upon which relief could be granted. It should also be observed that the soundness of the *Flannagan* case was questioned in *Creekmore* v. *United States*, 8 Cir., 237 Fed. 743, 54.

United States v. *Fay*, S. D. N. Y., 225 F. Supp. 677, cited at page 17 of petitioner's discussion, has no applicability here. That case involved a habeas corpus proceeding, in which the court held that the petitioner's right to avoid being twice placed in jeopardy for the same offense had not been violated; the petitioner's Fourth Amendment right to be free from unreasonable searches and seizures had been violated and on that basis the writ issued. The language quoted on page 681 of the opinion simply has no bearing on any of the issues presented in this case.

V. Petitioner Stated No Claim Within the Jurisdiction of the District Court Upon Which It Could Grant the Relief Sought.

Both the District Court and the Court of Appeals expressed substantial doubt as to whether the plaintiff even on paper has brought himself within the coverage of the Federal Civil Rights Act. Respondents respectfully urge that he has not. See the *Meyer* opinion, page 96, the *Van Steenberg* opinion, pages 128-129 and the Circuit Court's opinion, pages 21-22.

All three opinions correctly point out that community of citizenship of the parties destroys any possibility of diversity jurisdiction. Lack of jurisdiction, however, was not made a basis for the holdings; the lower courts assumed without deciding that jurisdiction existed, and went on to consider the merits of petitioner's allegations.

VI. Petitioner's Complaints Do Not Set Forth Short, Plain Statements Showing the District Court's Jurisdiction and Petitioner's Claims as Required By Rule 8(a) of the Federal Rules of Civil Procedure.

Respondents contend that the amended complaint in the *Meyer* case does not comply with Rule 8(a) of the Federal Rules of Civil Procedure and contained most, if not all, of the fatal defects found in the original complaint, which was dismissed and ordered stricken from the files of the court. At page 95 of 225 F. Supp. the trial court stated:

> "Admittedly, it (the amended complaint) is still not a model of a short and plain statement either of the grounds of jurisdiction, or as a showing that the plaintiff is entitled to relief. It fails in the test of cohesiveness, and obscurely takes several positions from undisclosed premises."

Almost all of the allegations in the complaint which could conceivably allege any wrongful conduct are conclusionary rather than factual in nature, see 225 F. Supp. 95. The foregoing paragraph applies with equal strength to the complaint in the *Van Steenberg* case, see 225 F. Supp. 120.

It is clear that the trial court was under no misapprehension as to the rules to be applied in ruling on a motion to dismiss based in whole or in part upon failure to state a claim on which relief might be granted. Trial court gave the petitioner every inference and presumption to which he was entitled. See 225 F. Supp. 102, 129. The trial court, however, did not base its holding, even in part, on this ground.

VII. Instructions and the Verdict in a Case Filed in Another Federal District Against a Man Not a Party to the Instant Cases Are Not Entitled to Consideration Here.

The matter relating to the action by plaintiff against Harry Edmondson in the U. S. District Court for the District of Kansas (Case No. T-3405) sought to be placed in issue in the Court of Appeals and in this Court were properly held not entitled to consideration by the Court of Appeals and are not entitled to consideration here. See 1A Barron & Holtzoff, Federal Practice & Procedure, § 349, at pp. 310-311, and opinion of the Court of Appeals, at p. 36.

In addition, respondents point out that those proceedings in no way tend to support any contention petitioner makes here. The instructions in that case disclose that a default judgment was entered against Edmondson. Notwithstanding plaintiff's ineffectual at-

tempt to tie the same allegations made in the *Houston, Meyer* and *Van Steenberg* cases to allegations of wrongful acts of Edmondson, the action in Kansas simply has nothing to do with the instant cases. The only allegations charged against Edmondson, previously a guard in the Nebraska State Penitentiary, are that he assisted in the imprisonment of petitioner during part of 1961 and that he during that time denied petitioner the use of sanitary facilities, see pages 55-56 of the petition. Note also the trial court's brief comment on the Kansas case and the Rhodes-Edmondson relationship at page 111 of 225 F. Supp. As the Court of Appeals observed, in its opinion, page 36, nothing in that case has any persuasive effect upon the issues in the instant cases.

CONCLUSION

The analysis of the facts made by the District Court, and affirmed by the Court of Appeals, is clearly correct. The conclusions of law set forth in the Opinion are supported by the decisions of this Court and the lower federal courts, and Petitioner has failed to disclose any conflict between the Circuits on any questions presented. No question is therefore presented which will justify the granting of a Writ of Certiorari herein.

Respectfully submitted,

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PROOF OF SERVICE

I, Clarence A. H. Meyer, one of the attorneys for respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on September ....., 1964, I served copies of the foregoing Brief in Opposition to Petition for Certiorari to the United States Court of Appeals for the Eighth Circuit upon Petitioner by depositing the same in a United States mail box, with first class postage prepaid, addressed to Mr. Paul E. Rhodes, Box 47, Howe, Nebraska, such being the post office address of said Petitioner.

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